



U.S. Citizenship  
and Immigration  
Services

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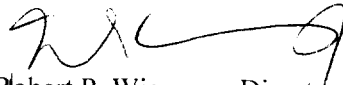
IN RE: Petitioner:  
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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Identified and returned to  
proper authorities for  
review

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its computer graphics designer as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner develops multi-player on-line computer games and claims that it is a branch of the beneficiary's foreign employer, located in Seoul, Korea. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge and did not demonstrate that the beneficiary would be employed in a position within the United States entity requiring specialized knowledge.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel contends: (1) that Citizenship and Immigration Services (CIS) erroneously applied a "clear and convincing" evidentiary standard rather than the proper "preponderance of evidence" standard to its analysis of the petition; (2) CIS erred in its denial of the petition where a preponderance of the evidence demonstrates that the beneficiary qualifies for an L-1B extension; (3) CIS erred in its "creation and application of false 'requirements' which are ultra vires of the statute and regulations"; (4) CIS erroneously applied a 1982 decision which was subsequently amended by the Immigration Act of 1990 (IMMACT 1990); and (5) CIS erred in denying the extension of the previously approved L-1B classification "without providing a rational explanation for the departure from its prior decision." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in the present matter is whether the beneficiary would be employed by the United States entity in a specialized knowledge capacity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the following:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines “specialized knowledge” as:

[S]pecial knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.

The petitioner filed the nonimmigrant petition on December 3, 2003 requesting that the beneficiary’s classification as an intracompany transferee with specialized knowledge be extended for two years. The petitioner noted on the petition that the beneficiary’s past and proposed duties in the United States entity would include designing and developing animation artwork for the company’s multimedia computer games.

In an attached letter from the petitioning organization, dated November 26, 2003, the petitioner’s director of human resources stated that from February 1999 to the present, the beneficiary has been employed in both the foreign and United States entities as a "Computer Graphics Designer." The human resources director noted that while in this position, the beneficiary “has contributed significantly to the creation and development of the Company’s flagship gaming products.” The human resources director provided the following description for the position of computer graphics designer:

The Computer Graphics Designer is primarily responsible for designing and developing animation art for multimedia title software which includes the development, modification and evaluation of three dimensional computer graphics. More specifically, the Computer Graphics Designer creates animation graphics displays and production-quality computer graphics using various computer software applications to define and develop the graphics in accordance with the Company’s design specifications. In this position, he utilizes his highly specialized and proprietary knowledge of [the petitioner’s] comprehensive game products, customized software applications, and [the petitioner’s] processes and procedures for the design and development of graphics for compliance with project specifications and [the petitioner’s] product quality standards. He utilizes his specialized knowledge to perform the following duties: create powerful computer graphics and 3-D designs; produce visuals and renderings for demonstration purposes; implement, troubleshoot and test the designs; identify any technical and/or design-related support necessary to service the graphics; assure optimal performance and quality.

On January 21, 2004, the director issued a request for additional evidence. The director asked that the petitioner provide the following documentation in support of the beneficiary's employment in a specialized knowledge capacity: (1) evidence, such as the company's brochure, relating to the petitioner's use of unique methodologies, tools, programs, or applications, and an explanation as to how these methodologies, tools, programs, or applications are different from other companies; (2) a description of the equipment, product, system, technique or service of which the beneficiary has specialized knowledge, as well as whether other United States employers use or produce such equipment, products, systems, techniques or services; (3) a record from the petitioner's human resources department highlighting how the beneficiary gained his specialized knowledge and detailing whether the beneficiary completed any training courses relevant to his specialized knowledge; (4) billing records documenting the petitioner's length of employment in the foreign organization; (5) the beneficiary's resume; (6) a copy of the United States company's organizational chart identifying the beneficiary's proposed position; and (7) a list of employees transferred to the United States entity during the last twelve months in a specialized knowledge capacity. The director also asked that the petitioner provide a statement explaining how long it would take the petitioning organization to train another employee to perform in the beneficiary's position and whether the petitioner would experience a significant interruption in its business during this training period. In addition, the director asked that the petitioner identify how many workers it employs in a position comparable to the beneficiary's and whether these employees received training similar to that completed by the beneficiary.

Counsel responded in a letter dated February 9, 2004. In response, counsel submitted the foreign corporation's marketing brochures for its "proprietary" games, Lineage and Lineage II, and the Lineage guidebook, which counsel stated "demonstrates the complexity of the gaming network, program, characters, artwork, storyline, etc." Counsel explained:

While employed abroad with [the foreign corporation] in Korea, [the beneficiary] worked on the development of the successive versions, revisions, additions, patches and artwork for the company's proprietary Lineage product, as he now works on [the petitioner's] proprietary Tabula Rasa. It was during his more than two years of work with the parent company abroad, and as a direct result of his exclusive employment with the parent company abroad, that [the beneficiary] acquired highly specialized knowledge of the Lineage gaming network, program, characters, artwork, storyline, etc., all of which are necessary to the development of proprietary [company] products which can be marketed globally and which will achieve high sales in the global market as opposed to only the U.S. market.

Counsel further explained that "as a key contributor" to the development of the Lineage artwork, "the beneficiary has specialized and rare knowledge of the design and development of artwork, characters, storyline, and character capabilities, powers, and movements which are part of [the petitioner's] proprietary gaming products." Counsel stated that the success of the foreign company is based on its consistency in image, design, and artwork and its utilization of the special knowledge possessed by "a small handful of key employees like [the beneficiary]."

With regard to the petitioner's training and employment of a replacement employee, counsel stated:

Please note that, because [the beneficiary] gained his specialized knowledge through his more than two years of direct and exclusive employment with [the foreign corporation] in Korea,

and because he contributed to the artistic creation, design, and development of successive versions of Lineage, which he now continues to perform these functions in the development of Tabula Rasa (scheduled for release fall 2004), [the beneficiary's] precise position cannot be taught to someone else. Other graphics design personnel, technicians and graphic artists can be trained and are from time to time added to the company, but [the beneficiary] cannot be dismissed without great injury to the company. His efforts are required to maintain consistency of design aspects between the company's U.S. and Korean developed products. This is critical to ensure success of Tabula Rasa outside of the U.S. market. The game is being developed to be marketed on a global basis; therefore [the beneficiary's] contributions are key to creating a product with a wide, global appeal. The company's continued success with the new Tabula Rasa product line simply requires the efforts and specialized knowledge of a Computer Graphics Designer steeped in the Lineage and Korean game culture and detail. Tabula Rasa is scheduled to release in October 2004. If a successor to [the beneficiary] should be trained to perform the precise duties he performs and to add the precise value he adds to [the petitioning organization], it is certain that no one could be trained for this position between now and October without seriously impacting the schedule and jeopardizing the launch date of Tabula Rasa. Please refer to the Employer's Statement in Support for confirmation of these facts.

Additionally, counsel challenged the director's request for information pertaining to training courses completed by the beneficiary and stated that "there is no requirement that knowledge come through special training programs or coursework." Counsel explained that instead, the beneficiary gained his specialized knowledge by working "directly and exclusively" for the foreign corporation, and contributing to the development of the company's products. Counsel submitted the beneficiary's resume, graduation certificate, and university transcripts as evidence of the beneficiary's "advanced knowledge of design technique and animation," which the beneficiary acquired during his fine arts college curriculum. Counsel also provided a certificate of employment confirming the beneficiary's employment with the foreign company since February 1999 and a tax clearance certificate referencing the beneficiary's salary. Counsel further noted that the foreign corporation had not transferred any L-1B employees to the United States during the last twelve months.

An additional letter from the petitioning organization, dated February 7, 2004, was submitted with the petitioner's response. The petitioner's director of human resources explained that the petitioning organization currently employs 136 workers, of which 27 are computer graphics designers. With regard to the beneficiary's specialized knowledge, the human resources director stated:

Please be advised that [the beneficiary] has specialized and rare knowledge of [the foreign corporation's] proprietary Lineage, a massively multi-player online gaming product, which utilizes gaming networks capable of hosting thousands of players simultaneously worldwide and involves significantly greater capacity than traditional games which simply permit two or three individuals to play against each other.

The human resources director also stated that because the Lineage product is "proprietary and unique" to the foreign corporation, no other corporation produces this product or has acquired "such a large online gaming network of established, long-time subscribers" and success in its market. The human resources director

provided additional information regarding the qualifications of the beneficiary similar to those previously outlined in counsel's response.

In a decision dated March 29, 2004, the director concluded that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a specialized knowledge capacity. The director stated that the beneficiary's job duties "do not appear to be significantly different from those of any other Computer Graphic Designer in your firm; nor are they different from the duties performed by other Computer Graphic Designers in similar organizations." The director also stated that the foreign corporation's procedures related to its Lineage product are not significantly different from the methods used in other companies specializing in the development of computer generated games. The director noted that the petitioner did not establish that an understanding of its "methods" is indicative of advanced knowledge.

The director also noted that although the beneficiary is said to contribute to the artistic creation of the Lineage and Tabula Rasa products, the beneficiary is not identified as the "lead designer" of the project. The director stated that "[t]his alone indicates that there are several employees who have the same level of knowledge and expertise about this product," and concluded that the beneficiary's knowledge is common among the petitioner's computer graphics designers. The director determined that the record does not show that the beneficiary's knowledge is so specialized or advanced that he meets the requirements of specialized knowledge. Accordingly, the director denied the petition.

In an appeal filed on April 26, 2004, counsel contends that the beneficiary qualifies for the requested L-1B classification because the petitioner demonstrated that: (1) the beneficiary is required to possess specialized knowledge in order to adequately perform as a computer graphics designer in the United States entity; (2) the beneficiary obtained his "highly specialized and advanced knowledge" from his employment with the foreign corporation; and (3) the petitioning organization would experience an interruption in its business if the beneficiary is replaced by another worker. Counsel claims that the beneficiary's knowledge of the foreign corporation's gaming products, software applications, and processes and procedures, specifically its Lineage product, is necessary in order to maintain the consistency of the foreign and U.S. entities' product designs. Counsel states that "[a]s with any matter of corporate 'branding,' consistency must be maintained to protect brand integrity and preserve and grow market share."

Counsel also states that the record demonstrates that the beneficiary acquired his specialized knowledge through his employment in the foreign corporation, which included his participation in the development of the Lineage product. Counsel again claims that neither the statute nor the regulations require that the beneficiary complete special training courses, and states that instead, the L-1 category requires that the beneficiary's specialized knowledge be obtained through one-year of employment with the foreign corporation.

In addition, counsel states that "the aspect which makes this case most clearly appropriate for L-1 classification" is the fact that the petitioning organization would incur an interruption in its business if required to replace the beneficiary with another worker. Counsel explains that the petitioner is prepared to market a Tabula Rasa "in the coming months," and states that the beneficiary is responsible for the game's artwork, which is derived from the style movements and cinematic characteristics of the Lineage characters.

Counsel also challenges CIS' "application of false 'requirements'" in its denial of the petition, which counsel claims are ultra vires of the statute and regulations. Counsel first contends that CIS erroneously required that the beneficiary acquire his specialized knowledge through the completion of a training program or

coursework. Counsel states that because the statute and regulations are silent as to a training requirement, CIS' application of such a requirement exceeds its interpretative authority. Secondly, counsel claims that CIS wrongly imposed a numerical limit on the workers employed by the petitioning and foreign entities in a position involving specialized knowledge. Counsel states that there is no statutory or regulatory limitation on the number of employees allowed to possess specialized knowledge. Counsel also disputes CIS's finding that the beneficiary did not possess specialized knowledge because he is a member of a team rather than the team leader. Counsel states that the beneficiary's employment as a team member does not alter the fact that the beneficiary possesses and will utilize specialized knowledge in his position as a computer graphics designer, nor does it prohibit the beneficiary from L-1B classification.

Counsel further contends that CIS erred in its application of the 1982 precedent decision, *Matter of Penner*, 18 I&N Dec. 49, 52 (Comm. 1982). Counsel states that *Matter of Penner* interpreted specialized knowledge prior to the statutory definition that was enacted through IMMACT 1990. Counsel notes that *Matter of Penner* is based in a large part on the intent of Congress, which counsel asserts was amended by IMMACT 1990. Counsel states that CIS should apply current law to the analysis of the beneficiary's qualifications for the L-1B classification.

Lastly, counsel claims that the director erred in reversing her prior approval of the beneficiary's L-1B classification without a rational explanation. Counsel acknowledges that CIS is not bound by its prior decisions, but states that CIS' failure to provide a rational explanation for the departure from its prior decision is arbitrary and capricious. Counsel also contends that CIS applied an incorrect, higher evidentiary standard in determining whether the petitioner satisfied its burden of proof. Counsel states that the proper evidentiary standard is the "preponderance of evidence" standard, rather than the "clear and convincing" standard applied by CIS.

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a specialized knowledge capacity as defined in § 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), and the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.* Although the petitioner has adequately described the position of "Computer Graphics Designer" and the duties that this position entails, the petitioner has failed to specifically describe the exact knowledge that the beneficiary possesses that would constitute "specialized knowledge." Instead, the petitioner and counsel have vaguely asserted that the beneficiary utilizes "highly specialized and proprietary knowledge" of the petitioner's game products, customized software applications, and the petitioner's processes and procedures. The petitioner has also asserted that the beneficiary has "highly specialized knowledge of the Lineage gaming network, program, characters, artwork, [and] storyline." However, the petitioner has not provided any specifics regarding this knowledge. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyrr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). And although the human resources director noted that the beneficiary "has contributed significantly to the creation and development of the Company's flagship gaming products," no evidence was submitted to substantiate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). For this reason alone, the petition may not be approved.

It is also appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981) (citing *Matter of Raulin*, 13 I&N Dec. 618 (R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)).<sup>1</sup> As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business' operation.

*Id.* at 53.

In *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). Although the definition of "specialized knowledge" in effect at the time of *Matter of Penner* was superseded by IMMACT 1990 to the extent that the former definition required a showing of "proprietary" knowledge, the AAO finds that the reasoning behind *Matter of Penner* remains applicable to the current matter. The *Matter of Penner* decision noted that the 1970 House Report, H.R. No. 91-851, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service." *Id.* at 51. The decision noted that the 1970 House Report was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner*, *id.* at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, "[m]ost employees today are specialists and have been trained and given

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<sup>1</sup> Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. As will be discussed, other than deleting the former requirement that specialized knowledge had to be "proprietary," IMMACT 1990 did not significantly alter the definition of "specialized knowledge" from the prior INS interpretation of the term.



specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees." 18 I&N Dec. at 119. According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. 18 I&N Dec. at 53; *see also*, *1756, Inc v. Attorney General*, 745 F. Supp. 9, 15 (D.D.C. 1990) (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to "key personnel" and "executives.")

Although counsel claims on appeal that *Matter of Penner* is not persuasive or controlling authority as a result of IMMACT 1990, the legislative history related to the definition does not indicate that Congress intended to change the nature of the specialized knowledge classification in 1990. Specifically, the 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. Although the statutory definition deleted the reference to "proprietary knowledge," Congress' 1990 amendments to the Act did not specifically overrule any administrative precedent decision. Instead, the 1990 House Report stated:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

H.R. REP. No. 101 723(I), 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418.

The 1990 House Report simply states that the Committee was recommending a statutory definition because of "varying" (*i.e.*, not specifically incorrect) interpretations. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that the cited cases remain useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification. Upon review of the legislative history, the AAO finds that IMMACT 1990 did not mandate a less restrictive interpretation of the term "specialized knowledge" or an interpretation that would differ from that in the binding precedent decision, *Matter of Penner*.

In the present matter, while the petitioner provided an ample description of the basic job duties to be performed by the beneficiary, it does not demonstrate employment in a specialized knowledge capacity. Specifically, the beneficiary's primary task of creating animated graphics displays and computer graphics amounts to the beneficiary's ability to produce a product for the petitioner through skilled labor, rather than carrying out a key process or function that is essential to the petitioning organization. *See Matter of Penner*, 18 I&N Dec. at 53. Counsel contends on appeal that the beneficiary's knowledge of the design aspects of the foreign corporation's Lineage product is necessary to maintain a consistent design between the products offered by the foreign and United States entities. While protecting the corporation's "brand integrity" may be relevant to the success of a product, the petitioner has not established that the beneficiary's knowledge of the company's designs is essential to the operation of the business. As in *Matter of Penner*, the beneficiary here appears to be a highly skilled worker employed in a technical, although not unique, position. *Id.* (determining that employees of the petitioner's drill rig crews, although highly skilled workers employed in technical occupations, did not possess unique knowledge not held by others in the industry).

Counsel also submits the Lineage guidebook as evidence of the beneficiary's specialized knowledge. Counsel stated that while the complexity of the Lineage game warrants a 184-page guidebook, one "can easily imagine that designing these games is exponentially more complex and would involve far greater experience and training to maintain consistency with existing game strategy, artwork, characters, and storyline in these sophisticated products." The complexity involved in playing a computer game is not an indicator of the level of knowledge possessed by its graphics designer. It cannot be assumed that the beneficiary possesses specialized knowledge because the Lineage game requires a 184-page instruction manual. The beneficiary's educational background, which includes an industrial design degree, provides him with the technical skills to produce the Lineage product. Again, the record contains no evidence that the beneficiary possesses any unique skills or knowledge beyond that of a skilled worker.

Additionally, the beneficiary's job description does not distinguish his knowledge as more advanced or distinct among other computer graphics designers employed by the foreign or U.S. entities or by other unrelated companies. The statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. at 15. The Congressional record specifically states that the L-1 category was intended for "key personnel." See generally, H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." *Webster's II New College Dictionary* 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's workforce.

A 1994 Immigration and Naturalization Service (now CIS) memorandum written by the Acting Associate Commissioner also allows CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." *Id.* The analysis for specialized knowledge therefore requires an examination of the knowledge in context of the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

The record does not contain evidence demonstrating that the beneficiary's knowledge rises above the general knowledge held commonly throughout the industry. The petitioner's human resources director noted in her

February 9, 2004 letter that the petitioner presently employs twenty-seven computer graphics designers. Counsel also acknowledges in her February 9, 2004 letter that the beneficiary acquired his knowledge solely from his two years of work experience with the foreign corporation. While counsel correctly notes that neither the applicable statute nor the regulations require that the beneficiary acquire knowledge through specific training, this information would aid in distinguishing the beneficiary's position as a key employee. It is relevant in determining whether the beneficiary has received supplemental training that would provide him with knowledge that is more advanced than others employed in a similar position. As the beneficiary acquired his knowledge through his work experience alone, it would appear that the beneficiary's knowledge of the foreign and U.S. entities' products is equivalent to the knowledge of other computer graphics designers with approximately two years of work experience in the foreign corporation. Counsel offers no distinction between the beneficiary's knowledge and that of the other computer graphic designers. Therefore, the beneficiary's knowledge cannot be distinguished as specialized or advanced. It is reasonable to conclude from the evidence presented that the beneficiary, while important to the company, does not rise to the level of key personnel.

Moreover, the petitioner has not identified how the beneficiary's knowledge of the Lineage product acquired in his position abroad is relevant to the petitioner's business in international markets. In part, the statutory definition requires that a beneficiary have "special knowledge" of the company's product and its application in international markets. *See* § 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). Here, counsel stated in her February 9, 2004 letter that the beneficiary's "efforts are required to maintain consistency of design aspects between the company's U.S. and Korean developed products." Counsel further stated that the success of the Tabula Rasa product line requires the specialized knowledge of a computer graphics designer who is experienced in the culture of the Lineage and Korean games.

The petitioner's assertions do not satisfy this portion of the statutory definition for two reasons. First, according to the petitioner's description of the beneficiary's job duties, the beneficiary is not responsible for "maintain[ing] consistency of design aspects between the company's U.S. and Korean developed products" any more than other Computer Graphics Designers. Second, the petitioner does not clarify how the beneficiary's knowledge of the Lineage product and Korean games would be relevant to the success of the petitioner's international sale of the Tabula Rasa product. It is unclear whether the beneficiary's "artistic" knowledge of Lineage is needed in order to design characters or features comparable to those in the Lineage game, which would ensure the public's association of Tabula Rasa with Lineage, thereby assisting in the petitioner's marketing and sale of the product. Or, in the alternative, it is unclear whether the beneficiary's "technical" knowledge of Lineage is needed for the design and development of the Tabula Rasa product. Although the beneficiary may have "contributed to the artistic creation, design, and development of successive versions of Lineage, [and] now continues to perform these functions in the development of Tabula Rasa," the petitioner is obligated to clarify how the beneficiary's knowledge of the creation, design and development of Lineage would be relevant to the petitioner's creation and sale of the Tabula Rasa product. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel submits evidence demonstrating that the beneficiary could not be replaced by another worker without causing a significant interruption to the petitioner's business. The AAO acknowledges that the 1994 CIS memorandum highlights this factor as a consideration in determining specialized knowledge. This factor

alone, however, is not conclusive of the beneficiary's employment in a specialized knowledge capacity. The Commissioner noted in the memorandum that "[i]t is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge." The Commissioner further stated that the petitioner's assertion that the beneficiary possesses specialized knowledge must be supported by evidence distinguishing that knowledge from the elementary or basic knowledge possessed by others and identifying that knowledge as "uncommon, noteworthy, or distinguished by some unusual quality." As discussed previously, the petitioner has not satisfied the essential requirement of distinguishing the beneficiary's knowledge as advanced or specialized. While the beneficiary may be considered a skilled worker who successfully contributes to the production of the petitioner's products, he cannot be considered to be employed in a specialized knowledge capacity.

Counsel also claims on appeal that CIS erroneously applied a "clear and convincing" evidentiary standard to its review of whether the beneficiary would be employed in a specialized knowledge capacity. Counsel correctly notes that the director applied the incorrect standard of proof. The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The director's decision is withdrawn as it relates to the evidentiary standard that is to be applied in this proceeding.

Additionally, counsel contends on appeal that CIS erred in reversing the beneficiary's prior approval of L-1B classification without a rational explanation. Counsel acknowledges that CIS is not bound by its prior decisions, but states that "the failure to provide a rational explanation for a departure from a prior decision is arbitrary and capricious and, as such, a violation of the Administrative Procedures Act." The record of proceeding does not contain a copy of the visa petition that counsel notes was previously approved. If the previous nonimmigrant petition was approved based on the same vague and unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Finally, the prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). The director properly reviewed the record before her and provided a rational explanation as to why the evidence failed to establish the beneficiary's employment in a specialized knowledge capacity.

For the foregoing reasons, the AAO cannot conclude that the beneficiary would be employed by the United States entity in a specialized knowledge capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record does not conclusively establish that the beneficiary's prior year of employment abroad was in a position that was managerial or executive, or involving specialized knowledge, as required in the regulation at 8 C.F.R. § 214.2(l)(3)(iv). Counsel claims that during the beneficiary's two years of employment in the foreign organization the beneficiary was involved in the development of the corporation's product, Lineage, and as a result, acquired specialized knowledge of the petitioner's product. The claim that the beneficiary participated in the development of Lineage during his two years of employment abroad, however, is questionable. The beneficiary's resume indicates that from July 1998 through January 1999 the beneficiary provided "[a]ssistance graphic [and] study to make game graphic design for on-line game 'lineage' in [the foreign organization]." According to the beneficiary's resume, the beneficiary assisted the foreign organization in the development of Lineage prior to his employment with the organization, and rather, while he was attending college. According to the beneficiary's resume, he did not begin working for the overseas company until February of 1999. The beneficiary does not indicate on his resume that his actual employment experience abroad related to the product Lineage, which was counsel's basis for the beneficiary's specialized knowledge. Accordingly, counsel's claim regarding the beneficiary's employment in a specialized knowledge capacity is questionable. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether the record demonstrates the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization as required in the Act at section 101(a)(15)(L), 8 U.S.C. §1101(a)(15)(L). In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. See *Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); see also *Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982) (stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. Here, the petitioner submitted a notarized certificate signed by its director of human resources, in which she affirmed her access to corporate records and attested to the branch relationship between the petitioner and the beneficiary's foreign employer. The certification by the petitioner's human resources director, which fails to document which corporate records the director has access to and has

reviewed, does not conclusively establish that the beneficiary's foreign employer and the petitioning entity possess the requisite qualifying relationship. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. The appeal will be dismissed for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.